



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 13, 1993

Mr. James D. Braddock
General Counsel
Texas Air Control Board
12124 Park Circle
Austin, Texas 78753

OR93-559

Dear Mr. Braddock:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 18545.

The Texas Air Control Board (the "board") received an open records request for a former employee's personnel file. Pursuant to section 552.305 (former section 7(c)) of the Open Records Act, you notified the former employee of the open records request and he subsequently advised this office of his reasons for withholding the information. You have submitted to this office for review what we presume to be a representative sample of the employee's performance evaluations and a copy of his college transcript.² You

¹The 73rd Legislature has repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg. ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

²Because these are the only documents submitted to us, we assume that the board has released all other records in the employee's personnel file. See Open Records Decision No. 197 (1978) (refusal to submit copies of requested information results in presumption that the information is public).

We note that the requestor has filed a complaint with this office in which he alleges that the employee's 1991 "leave slips", including his "compensatory [overtime] slips," were destroyed after the board received the requestor's open records request. Records that are the subject of a pending open records request may not be destroyed, notwithstanding any statutory or other authority to the contrary. See, e.g., Open Records Decision No. 505 (1988) (voted ballots scheduled for destruction may not be destroyed pending an open records request). Unlawful destruction of public records that are subject to an open records request may constitute a criminal denial of access under section 552.353(a) (former section 10(b)).

contend that in order to protect the privacy interests of the employee, the board should withhold these records pursuant to sections 552.101, 552.102, and 552.114 (former sections 3(a)(1), 3(a)(2), and 3(a)(14), respectively) of the Open Records Act (the "act").

We first address your contention that section 552.102 protects the submitted documents from disclosure. Section 552.102(a) protects in pertinent part:

information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

The test for section 552.102 protection is the same as that for information protected by common-law privacy under section 552.101: to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App. - Austin, 1983, writ ref'd n.r.e.); *see also* Open Records Decision No. 336 (1982). The employee performance evaluations pertain solely to the former employee's performance as a public servant and as such are within the realm of public interest. Section 552.102 was not intended to protect this type of information. *See, e.g.*, Open Records Decision Nos. 473 (1987) (even highly subjective evaluations of public employees may not ordinarily be withheld under section 552.102); 444 (1986) (the public has a legitimate interest in knowing the reasons for the dismissal, demotion, promotion, or resignation of a public employee). We conclude that the performance evaluations at issue here may not be withheld pursuant to section 552.102.

You also claim that section 552.102 exempts from disclosure the former employee's college transcript. However, by its very terms, section 552.102(b) protects only those college transcripts maintained in the personnel files of professional public school employees. *See generally* Open Records Decision No. 526 (1989). Further, this office has previously held that the disclosure of public employees' transcripts does not constitute a violation of those employees' right of privacy. *See* Open Records Decision

of the Open Records Act. *See* Gov't Code § 552.353(a), (former V.T.C.S. art. 6252-17a, § 10(b)), (1) (Vernon Supp. 1993). *See also* Gov't Code § 552.351 (former V.T.C.S. art. 6252-17a, § 12); Tex. Penal Code §§ 37.10(a)(3), 37.01(1) (Vernon Supp. 1993) (intentional destruction of a governmental record is a criminal offense). Authority to pursue alleged criminal violations of these laws lies with the local state prosecutor and not with the attorney general.

No. 157 (1977). Consequently, the college transcript at issue here may not be withheld pursuant to section 552.102.

We next address your contention that the employee's college transcript comes under the protection of section 552.114 of the act. Section 552.114 protects "information in a student record at an educational institution funded wholly or partly by state revenue." Section 552.026 (former section 14(e)) of the act further provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974, which is informally known as "the Buckley Amendment," provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases without authorization education records of students (or personally identifiable information, other than directory information, contained therein) to anyone other than certain enumerated federal, state, and local officials and institutions. See 20 U.S.C. § 1232g(a)(1)(A), (a)(2), (b)(1). However, the board clearly is *not* an "educational agency or institution" for purposes of section 552.026, nor is it an "educational institution funded wholly or in part by state revenue" for purposes of section 552.114. These exceptions to disclosure do not apply to college transcripts held by administrative agencies, such as the board. See, e.g., Open Records Decision Nos. 390 (1983) (the Buckley Amendment does not govern access to records in the custody of governmental bodies that are not educational institutions or agencies); 157 (1977).

We next address the former employee's contentions regarding the disclosure of his personnel file. He first argues that "I supplied information in my personal [sic] file with the understanding that it was to be kept confidential." Of the documents submitted to this office, this statement clearly pertains only to the college transcript. Information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Consequently, unless the requested information falls within one of the act's exceptions to disclosure, it must be released. As discussed above, the college transcript may not be withheld pursuant to either section 552.102 or section 552.114.

The former employee also informs this office that:

I consider information in my employment file, such as my Employee Performance Reviews (EPRs), extremely personal in nature. Release of this information could cause severe mental anguish.

In Open Records Decision No. 438 (1986), this office addressed a similar claim where the governmental body alleged that the release of certain information would result in the exacerbation of a public employee's physical and emotional difficulties. As noted in that decision, the test for common law privacy is an objective rather than a subjective test.

[I]nformation may be withheld on common law privacy grounds only if it is highly intimate or embarrassing, such that a reasonable person would object to its release. This test permits no inquiry into facts about a specific individual which would make that person more sensitive than the person of ordinary sensibilities. Accordingly, in applying the common law privacy test, this office is not free to consider the individual sensibilities of this particular complainant as an aspect of common law privacy.

Open Records Decision No. 438 (1986) at 6. Consequently, because the information contained in the performance reviews does not meet the test for common law privacy as established in *Hubert, supra*, this information must be released.

Finally, we address the former employee's contention that the requestor:

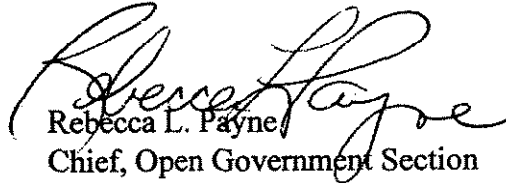
has repeatedly threatened and tried to intimidate me. Information from my files such as my home address could assist this individual in carrying out these threats.

Section 552.117(1)(A) (former section 3(a)(17)(a)) of the act provides for the withholding of the home address and home telephone number of a public employee or former public employee only if that person has elected to have this information kept confidential in compliance with section 552.024 (former section 3A) of the act. You have provided this office with no evidence that suggests that the former employee had made such an election prior to the date of the open records request. *See* Open Records Decision No. 530 (1989) (governmental bodies may not solicit a response from its employees under section 552.024 in response to a pending open records request). Unless you demonstrate, within 7 days of the date of this letter, that the employee had elected to keep his home address and telephone number confidential prior to the board's receipt of the open records request, the board must release the former employee's address and telephone number.

We therefore conclude that the board must release the personnel file of the former employee, including his performance evaluations and his college transcript, in its entirety. However, the home address and home telephone number of the former employee may be redacted and withheld from disclosure if the board provides this office with the requisite showing as discussed above.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,


Rebecca L. Payne
Chief, Open Government Section

RLP/rho

Ref.: ID# 18545
ID# 18809
ID# 19331

cc: Mr. Mike Vance
Texas Air Control Board
Region 7 Office
5555 West Loop, Suite 300
Bellaire, Texas 77401
(w/o enclosures)